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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HELENE HASSO,

Plaintiff and Respondent,

v.

RONALD HASSO et al.,

Defendants and Appellants.

G040389

(Super. Ct. No. A182042)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gerald G. Johnston, Judge. Affirmed.

Law Office of Steven R. Young and Jim P. Mahacek for Defendants and Appellants.

Latham & Watkins, Jon D. Anderson, Kristine L. Wilkes, and Michael W. De Vries for Plaintiff and Respondent.

Appellants Ronald Hasso (Ronald) and Heather Hasso (Heather) appeal from an order denying their anti-SLAPP motion¹ to strike respondent Helene Hasso's (Helene) probate petition.² The court correctly denied the motion because Helene did not assert a cause of action against Ronald and Heather. We affirm.

FACTS

Helene filed a first amended probate petition (FAP) in November 2007 containing the following allegations. Helene is the surviving spouse of Norman E. Hasso and the lifetime income beneficiary of a trust he had created.³ The trustee is Norman's sister, May. The remainder beneficiaries are Norman and Helene's children, Heather and Ronald.

Helene alleged May breached the duty she owed to Helene as a beneficiary. May failed to distribute trust income to Helene, wrongly characterized income as principal, denied Helene's requests for information and failed to provide an accounting, and acted adversely to Helene in a variety of ways. Helene sought to remove May as trustee, and sought damages and other relief against May.

The FAP contains obtuse allegations of a Hasso family conspiracy. May "and other [Hasso] family members have conspired to defraud [Helene] and divert the

¹ We respectfully adopt the parties' use of first names for clarity.

² "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1; see Code Civ. Proc., § 425.16.) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

³ More particularly, Norman created the Norman E. Hasso 1993 Trust, which was divided when he died into the "Exemption Trust" and the "Marital Trust." The Marital Trust was itself divided, and now comprises two subtrusts. These subtrusts are the "trust" at issue here.

proceeds of the fraud to themselves.” The Hassos consider the trust income as belonging to their family, not an “outsider” like Helene. May thus tries to avoid distributing income to Helene, and instead works to maximize the amount of trust assets that will eventually flow to Heather and Ronald. May “and her family members” also “attempt to control [Helene] personally and financially and to deprive [Helene] of the full benefits of the trusts and of her own personal assets.” May “collaborate[s] extensively with [Ronald and Heather] and their attorneys with the intent and purpose of coordinating their strategy in this proceeding to the detriment of [Helene] and the benefit of [Ronald and Heather] and [May].” May “has attempted to coerce [Helene] to comply with her improper ‘settlement’ demands by threatening that [Ronald and Heather] would file an ‘intentional infliction of emotional distress’ lawsuit against [Helene] if she does not accede to [May’s] and [Ronald and Heather’s] improper demands.”

In the FAP, Helene sought to “trace trust property that has been wrongfully transferred or disposed of and to recover the property or its proceeds,” as well as to impose an equitable lien or constructive trust on all trust property. Helene served Ronald and Heather with notice of the FAP, consistent with their status as beneficiaries. (Prob. Code, § 17203.)

Ronald and Heather demurred to the FAP and filed an anti-SLAPP motion to strike the FAP. In their anti-SLAPP motion, they contended the FAP asserts a cause of action against them for conspiring with May to defraud Helene. They claimed the FAP sought to impose a constructive trust or equitable lien on trust property wrongfully transferred to them.

The court continued the hearing on the anti-SLAPP motion and invited additional briefing. It asked the parties to discuss “whether Helene Hasso has stated a cause of action against Ronald and Heather Hasso in her [FAP].” Helene stated in her brief, “No fair reading of the FAP could lead to the conclusion that the FAP attempts to state a cause of action against [Ronald and Heather],” as the FAP fails to “implicate[] any

‘primary duty’ owned by [them].” Helene noted she “has repeatedly stated that the FAP does not attempt to state any cause of action against [Ronald and Heather]” and maintained “nothing in the FAP could reasonably be construed as attempting to state a cause of action against [them], as the FAP does not allege that [they] owe a duty to her and does not allege any breach of such a duty. The FAP does not seek recovery from [Ronald and Heather] for wrongful conduct. In fact, the FAP does not request any relief whatsoever from [them].”

In the meantime, the court sustained Ronald and Heather’s demurrer. It held the FAP failed to state a cause of action against them. It explained at the hearing on the demurrer, Ronald and Heather, “in my view, do not have any role in this litigation, other than the fact that they are beneficiaries of the trust and interested parties. And there is no cause of action that names them. They do not have any liability from what I can see.”⁴

At the hearing on the anti-SLAPP motion, Helene’s counsel reiterated the FAP does not purport to state a cause of action against Ronald and Heather. Addressing Ronald and Heather’s counsel directly, Helene’s counsel stated, “I can’t say this anymore clearly than I’m about to. We are not stating a claim against your clients. We are not stating a claim for conspiracy against your clients. We are not seeking damages from your clients.” He told the court the FAP “do[es] not allege a conspiracy against Ronald and Heather. The allegations that were cited were brought to the court’s attention

⁴ Ronald and Heather’s sustained demurrer to the FAP does not moot their anti-SLAPP motion, which they filed on the same day as their demurrer. A party is entitled to a ruling on its pending anti-SLAPP motion to determine whether it may recover its attorney fees and costs pursuant to the anti-SLAPP statute, even if the subject pleading has been dismissed in the interim. (*White v. Lieberman* (2002) 103 Cal.App.4th 210, 220-221 [demurrer sustained]; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 751 [voluntary dismissal].) In contrast, Ronald and Heather’s anti-SLAPP motion would be moot if the court had sustained the demurrer before they even filed the anti-SLAPP motion. (See *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 383 [denying anti-SLAPP attorney fees where motion filed after voluntary dismissal].)

because we believe that they are relevant to show the bias of [May]; that [May] behind — not within this proceeding, but outside of this proceeding — is coordinating with Ronald and Heather. [I]t certainly is evidence of [May's] bias, and it is solely for that purpose these allegations are included.” Helene’s counsel conceded, “We would be absolutely precluded from coming to your honor at the end of this proceeding and saying . . . we would now like a judgment to be entered against [Ronald and Heather] for damages, conspiracy damages. We would be absolutely precluded by what I just said on the record and what we have repeatedly stated.”

The court denied the motion. It stated, “I understand why [the FAP] has created some concern on behalf of [Ronald and Heather]. I can see how they would become worried when they are alleged to be a part of a conspiracy as a part of the language here. But, you know, ultimately, I have to look at the remedy that is being sought, and there is no relief that can be gotten against them in my view. [¶] We’ve had a representation from [Helene’s counsel], I think, not only in this occasion but on past ones, that there will be no attempt to try and seek any kind of a relief against [Ronald and Heather], and they’re bound by that, at least with regard to this petition.”

DISCUSSION

The anti-SLAPP statute provides, “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike.” (§ 425.16, subd. (b)(1).) An order denying an anti-SLAPP motion to strike the FAP is directly appealable and subject to independent review. (§ 425.16, subd. (i); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

At times, Helene misapprehends the threshold issue of the anti-SLAPP analysis as being whether she stated a cause of action against Ron and Heather. This

oversimplification conflates the two steps of the anti-SLAPP analysis. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Step one is whether the plaintiff *asserts* — purports to state — a cause of action based on protected free speech or petitioning activity. (*Ibid.*; see also § 425.16, subd. (b)(1).) Step two is whether the plaintiff shows a probability of prevailing on the cause of action. (*Ibid.*) A pleading that tries — but fails — to state a cause of action based on protected activity becomes subject to an anti-SLAPP motion at step one, and falls victim to it at step two. It must be stricken.

But a pleading that does not purport to state a cause of action against a party never gets past step one. A party who faces no cause of action at all cannot pursue an anti-SLAPP motion because there is no protected cause of action for them to strike. (See *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1392 [insurer’s anti-SLAPP motion denied where plaintiffs “did not name [insurer] as a defendant in the complaint, nor did they seek any relief against [it] in the complaint”].)

Only under an extremely liberal reading would the FAP even purport to state a cause of action against Ronald and Heather. Ronald and Heather rely most heavily upon the conspiracy allegations, but the FAP just alleges May has conspired with “other family members.” This is not necessarily an allusion to Ronald and Heather. Three paragraphs after the conspiracy allegations, the FAP clarifies “[May] and her family members, including [May’s] father, Daniel Hasso, and [May’s] mother, Sumaia Hasso, treated [Helene] as though she had no right to income from the trusts” And five paragraphs after that, the FAP alleges “there has been, and continues to be, a great deal of personal animosity shown to [Helene] by [May] and other members of [May’s] family, including [May], her parents [i.e., Daniel and Sumaia], and her brother, Alan Hasso.” The alleged conspiracy may involve May and “other family members,” but nothing indicates those family members are Ronald and Heather.

And the FAP allegations specifically referencing Ronald and Heather do not assert any cause of action against them. Helene alleges May has “collaborated extensively” with Ronald and Heather to coordinate litigation strategy. This alleged collaboration suggests May is a biased trustee subject to removal, but on its face does not suggest Ronald and Heather have incurred any legal liability to Helene. Helene also alleges May has threatened that Ronald and Heather would file a baseless lawsuit against her “if she does not accede to [May’s] and [Ronald and Heather’s] improper demands.” This alleged threat was made by May, not Ronald and Heather. And the FAP never explains what “improper demands,” if any, were made by Ronald and Heather. The thrust of these allegations, too, is May’s bias towards Ronald and Heather, not any alleged wrongdoing by them.

And even if the wispy allegations concerning Ronald and Heather were taken to assert a cause of action against them, Helene has stated she will not pursue it. She claimed in her supplemental brief, “No fair reading of the FAP could lead to the conclusion that the FAP attempts to state a cause of action against [Ronald and Heather],” and “nothing in the FAP could reasonably be construed as attempting to state a cause of action against [them], as the FAP does not allege that [they] owe a duty to her and does not allege any breach of such a duty. The FAP does not seek recovery from [Ronald and Heather] for wrongful conduct. In fact, the FAP does not request any relief whatsoever from [them].” And at the hearing, Helene’s counsel stated, “We are not stating a claim for conspiracy against [Ronald and Heather]. We are not seeking damages from [them].” The conspiracy allegations are “evidence of [May’s] bias, and it is solely for that purpose these allegations are included.” Helene’s counsel conceded, “We would be absolutely precluded by what I just said on the record and what we have repeatedly stated” from seeking a judgment based on the FAP against Ronald and Heather. The court expressly relied upon these representation in denying the motion, and Helene relies upon them on appeal to show the motion was correctly denied.

Thus, even if the FAP asserts a cause of action against Ronald and Heather, Helene would be bound by her repeated representations to the contrary. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558 [party judicially estopped from denying position they successfully urged court to adopt]; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752 [counsel's deliberate concessions are binding judicial admissions].)

Helene cannot seek affirmative relief against Ronald and Heather based on the FAP, having repeatedly denied it purports to state a cause of action against them. And so Ronald and Heather cannot pursue an anti-SLAPP motion to strike it.

DISPOSITION

The order is affirmed. Helene shall recover her costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.